82-1743

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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER

WILLIE MOONEY, JR.

PETITIONER

VERSUS

STATE OF LOUISIANA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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INTRODUCTION

Petitioner Willie Mooney, Jr., through the undersigned counsel, requests that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above styled case on January 12, 1983.

QUESTIONS PRESENTED FOR REVIEW

(I.) Whether petitioner was deprived of the effective assistance of counsel in pre-plea and sentencing stages of the adversary process due to his attorney's joint representation of defendants with conflicting interests?

(II.) Whether the decision of this Court in Wood v. Georgia compels the State Court to conduct a hearing in order to determine whether the conflict of interest so strongly suggested by the record did in fact exist, irrespective of petitioner's failure to brief this argument in his original appellate brief to the Supreme Court of Louisiana?

TABLE OF CONTENTS AND TABLE OF AUTHORITIES

	Page
Introduction	1
Questions Presented for Review	1
Table of Contents and Table of Authorities	2
Reference to Opinion Below	5
Statement of Jurisdiction	5
Constitutional Provisions and Statutes Involved	7
Statement of the Case	7
Reasons for Granting Writ	11
Conclusion	24
Certificate	29

	Page
Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L.J. 1179 (1975)	17
American Bar Association Project on Minimum Standards for Criminal Justice; Standards Relating to Sentencing Alternatives and Procedures, 5.3 (E)	22
Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663 (1978)	15
Caruso v. Zelinsky, 515 F.Supp. 676 (D.N.J. 1981)	15
Castillio v. Estelle, 504 F. 2d 1243 (5th Cir. 1974)	14
Cuyler v. Sullivan, 446 U.S. 335, 98 S.Ct.1708 (1980)	12, 24
Gardner v. Florida, 430 U.S. 349, 358; 97 S.Ct. 1197 (1977)	21
Glasser v. United States, 315 U.S. 60, 75; 62 S.Ct. 457 (1942)	23
Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981)	16
Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978)	11, 12, 14, 19, 20
Johnson v. Hopper, 639 F.2d 236, (5th Cir. 1981)	14
Kuh, Defense Counsel's Role in Sentencing, 14 Crim. L. Rev. 433 (1978)	22

	Page
Mason v. Balkcom, 531 F.2d 717, (5th Cir. 1976)	16
Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 257 (1967)	21
Neal v. Wainwright, 512 F.Supp. 92 (M.D. Fla. 1981)	16
State v. Freeman, 409 So.2d 581, 586, (La. 1982)	13
Trahan v. Estelle, 544 F.2d 1305 (5th Cir. 1977)	17
Turnquest v. Wainwright, 651 F.2d 331 (5th Cir. 1981)	14
United States v. Alvarez, 580 F. 2d 1251 (5th Cir. 1981)	13
United States v. Pinkney, 551 F.2d 1241, 1251 (D.C. Cir. 1976)	22
Walker v. Caldwell, 478 F.2d 213, 222 (5th Cir. 1973)	15
Walker v. Garrington, 521 F. Supp. 1313, 1322 (M.D. Tenn. 1981)	16
Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 1101-1103 (1981)	13,14,23, 24,26,28
U.S. Const. Amend. VI	7

REFERENCE TO OPINION BELOW

The decision of the Supreme Court of the State of Louisiana affirming the judgment of conviction and sentence of the Fifth Judicial District Court in and for the Parish of Richland is unreported at the time of preparation of this brief, but is numbered as 82-KA-0929 on the docket of the Supreme Court of the State of Louisiana, (La. January 12, 1983).

STATEMENT OF JURISDICTION

On October 14, 1981, petitioner pleaded guilty to four counts of theft and was on January 27, 1982, sentenced by the Fifth Judicial District Court to serve three years imprisonment at hard labor. On or about June 2, 1982, petitioner appealed his judgment of conviction and sentence to the Supreme Court of the State of Louisiana; said conviction and sentence being affirmed on January 12,

1983. Rehearing was denied on February 11, 1983. On February 18, 1983, petitioner, through undersigned counsel, notified the Supreme Court of the State of Louisiana of his intention to apply for a writ of certiorari and moved for certification and transmittal of the record to the Clerk of this Honorable Court. On February 22, 1983, the Supreme Court of the State of Louisiana acknowledged petitioner's notice of intent, but denied his motion for certification and transmittal of the record pending the order of this Honorable Court. On March 1, 1983, the Supreme Court of the State of Louisiana stayed execution of the sentence pending petitioner's application for writ of certiorari to this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. CONST., AMEND. VI, PROVIDES:

> IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

STATEMENT OF THE CASE

Defendant and six co-defendants were charged in connection with an ongoing conspiracy to defraud insurance companies, wherein a group of nine persons committed a total of eighty-two claims to various companies within a three-year period of time. The State further charged Cammie Jean Mooney, Douglas Wayne Mooney, William James Mooney, Kenneth L. Mooney, Barbara

Houston, and Cherry Lynn Mooney with charges relating to the ongoing scheme to defraud. Following the arrest of the suspects William James Mooney, son of the defendant, retained Mr. Charles Brackin of Lake Providence, Louisiana, to represent him in connection with the pending criminal charges. After securing William James Mooney's release from jail pending bond, Mr. Brackin visited the home of the defendant and discussed the aspects of the case with Cammie Jean Mooney, the wife and co-defendant of the accused. On this occasion Mr. Brackin offered to assist Mr. and Mrs. Mooney and gathered information necessary in order to secure defendant's release on bail. Brackin then conducted a meeting with all of the defendants in which he agreed to represent all defendants in connection with all of the charges. While Brackin agreed to

represent defendant and his wife for a fee of four thousand dollars, he required each additional defendant to pay a three thousand five hundred dollar fee.

On February 25, 1981, Brackin appeared with the defendants in the Fifth Judicial District Court for a preliminary hearing and agreed to a consolidation of the cases for the purposes of the preliminary examination. Probable cause was found and arraignment was set for October 14, 1981. Counsel then met with his clients and recommended that each defendant plead guilty. On October 14, 1981, William James Mooney, Douglas Wayne Mooney, Kenneth L. Mooney, Cammie J. Mooney, and the defendant appeared at arraignment and pleaded to multiple counts of theft. On January 27, 1982, each of the defendants appeared in court for sentencing. Defendant was sentenced to serve three years imprisonment at hard labor.

Following the sentencing defendant retained Mr. James D. Sparks of Monroe, Louisiana, to represent him in connection with an appeal. Appellate counsel assigned two errors relating to the particular sentence imposed. The Louisiana Supreme Court on January 12, 1983, affirmed the sentence. On January 25, 1983, defendant retained the undersigned counsel to represent him in connection with an application for rehearing, which was denied on February 11, 1983.

Defendant respectfully urges that he was denied the effective assistance of counsel free from conflicting interests during each stage of the proceedings. Further, defendant urges that said error was not properly assigned in writing due to the failure of original appellate counsel to render effective assistance in the processing of the appeal. Defendant urges two questions for review not originally

assigned, as error, which should in all fairness be fully considered.

REASONS FOR GRANTING WRIT

This Court in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978), noted the dangers inherent in joint representation. The Holloway majority relied upon relevant American Bar Association Standards, which provided:

> "Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which have jeopardized the right of each defendant to the fidelity of his counsel.
>
> 435 U.S. at 483, N. 6, CITING A.B.A. PROJECT ON STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE, SECTION 3.4 (b), P. 171, (1974).
>
> "Except for preliminary matters such as initial hearings or application for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one

> defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.
>
> 435 U.S. at 486, CITING A.B.A. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE THE DEFENSE FUNCTION, SECTION 3.5 (b), P. 123, (1974)."

The Holloway decision was, however, limited to those potential conflicts of interest called to the attention of the trial court by the defense attorney. In Cuyler v. Sullivan, 446 U.S. 335, 98 S.Ct. 1708 (1980), this Court refused to fashion a general rule requiring judicial inquiry into all instances of joint representation and provided that "unless the trial court knows or reasonably should know that a particular conflict exists, the Court need

not initiate an inquiry." (Id., 98 S.Ct. at 1717). See; State v. Freeman, 409 So.2d 581, 586 (La. 1982), ("It is only when the possibility of conflict of interest from joint representation appears that a Court has the duty to inquire whether the conflict is disqualifying."), (emphasis added). However, the "possibility of a conflict of interests" or "potential for injustice" will often be sufficient to require judicial inquiry. Wood v. Georgia, 450 U.S. 261, 101 S.Ct.1097, 1101-1103 (1981).

Alleged conflicts of interest must be actual rather than speculative before implicating Sixth Amendment considerations. United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978). But, a conflict of interest rising to Sixth Amendment proportions is created when the defense attorney is placed in a situation which is "inherently conducive to divided loyalties." See;

Castillio v. Estelle, 504 F.2d 1243 (5th Cir. 1974), and, Johnson v. Hopper, 639 F.2d 236 (5th Cir. 1981). Such a division of loyalties may occur when an attorney owes a duty to a party whose interests are adverse to those of his client. Wood v. Georgia, supra. In the context of multiple representation, a conflict of interest is shown when the defense attorney is placed in a situation in which his obligation to take some action favorable to one client might be detrimental to other clients. Holloway v. Arkansas, supra. See; Johnson v. Hopper, supra, 639 F.2d at 238, (conflict of interest in cross-examination of co-defendant, and, Turnquest v. Wainwright, 651 F.2d 331 (5th Cir. 1981), (conflict of interest due to failure of defense attorney to call prospective witness whose testimony would have likely exculpated one defendant while incriminating another).

In the instant case the attorney's divided loyalty prevented him from exploring plea negotiations on behalf of the defendant, evaluating possible antagonistic defenses, or seeking an agreement in which the defendant might cooperate with the prosecution. The plea negotiation process has been deemed an essential and highly desirable component of the administration of criminal justice. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663 (1978). For this reason, the defense attorney has at least some responsibility in the plea negotiation setting to render effective assistance in what is actually the most important stage of the proceedings for a defendant waiving trial. See generally; Walker v. Caldwell, 478 F.2d 213, 222 (5th Cir. 1973), (failure of attorney to attempt negotiation of multi-count indictment); Caruso v. Zelinsky, 515 F.Supp. 676,

(D.N.J., 1981), (failure of attorney to convey a proposed plea offer to his client); Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981), (failure of attorney to explore plea negotiations of duplicitious indictments); Mason v. Balkcom, 531 F.2d 717 (5th Cir. 1976), (failure of attorney to seek plea bargain when the accused was clearly less culpable than his experienced co-defendants); Neal v. Wainwright, 512 F.Supp. 92 (M.D. Fla., 1981), (total failure of attorney to render any semblance of effective representation in the pre-plea stages); and Walker v. Garrington, 521 F.Supp. 1313, 1322 (M.D. Tenn., 1981), (attorney failed to correctly advise his client of controlling aspects of the law relating to his particular factual situation due to conflicting interest and thus "adversely affected petitioner's representation...in the plea negotiation stage...")

See also; Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L.J., 1179 (1975), (the plea bargaining process is one in which the attorney's conduct should be closely scrutinized due to the ethical problems inherent in the bargaining process), and, Trahan v. Estelle, 544 F.2d 1305 (5th Cir. 1977), (Goldberg, J., concurring specially at 1318), (duty of attorney to provide effective representation in the pre-plea stages involves utilization of bargaining leverage to "undercut the prosecutor's bargaining power").

The record below amply demonstrates facts which should have facilitated bargaining on behalf of defendant Willie Mooney, Jr. The testimony of Claude Mercer, an investigator of the Criminal Intelligence Section of the Louisiana State Police, and the State's principal witness at the preliminary examination, indicated that all

the appraisals used to procure the insurance claims by fraud were obtained at Mooney's Body Shop in Delhi, Louisiana, an establishment owned and operated by William James Mooney. Mercer further stated that the "vast majority" of the disputed claim checks had been made payable to Mooney's Body Shop and speculated that William James Mooney had cashed the checks and given money back to the various claimants. This evidence clearly indicated that William James Mooney was in fact the key-man in the ongoing conspiracy in that virtually all of the disputed claims were paid as a result of false estimates prepared by William J. Mooney. Additionally, the records compiled by Mercer indicated that two defendants, William James Mooney and Douglas Wayne Mooney, had each received over thirty thousand dollars in disputed insurance proceeds, while

defendant's receipts were estimated at approximately twenty-three thousand, nine hundred and forty dollars, ($23,940.00). Comparatively, Kenneth Mooney's share in the receipts was estimated at approximately seventeen thousand two hundred and twenty-two dollars ($17,222.00), while Barbara Houston was estimated to have fraudulently obtained approximately fourteen thousand dollars ($14,000.00). Finally, the record reveals that William James Mooney was charged with eight counts of theft, Douglas Wayne Mooney with seven counts, Kenneth Mooney with five counts, and Barbara Houston with four counts. Despite the obvious fact that at least two defendants were more culpable than the defendant, Willie Mooney, Jr., was inexplicably the only defendant actually sentenced to serve a prison term.

This Court correctly observed in Holloway v. Arkansas, supra, 435 U.S. at

489-490, the "joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." As the Holloway majority further provided:

> "But in a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation."
>
> 435 U.S. at 490-491, (emphasis added).

Moreover, the attorney's conflict of interest pervaded the entire sentencing

proceeding and deprived defendant Willie Mooney, Jr., of a meaningful and fair hearing as to sentence. "It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197 (1977). "Sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel" Id., 430 U.S. at 358.

This Court, in Mempa v. Rhay, 389 U.S. 128, 88 S.Ct.254, 257 (1967), acknowledged: "...the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to prepare his case as to sentence is apparent."

It is now apparent that "the sentencing stage is the time at which for many defendants the [attorney can perform his or her] most important service of the entire proceeding...." American Bar Association Project on Minimum Standards for Criminal Justice; Standards Relating to Sentencing Alternatives and Procedures, 5.3 (E). "As long as judges in criminal matters retain broad discretion in imposing sentence, defense counsel's role may, if intelligently performed, do much to minimize that sentence that the Court may impose." See; Kuh, Defense Counsel's Role in Sentencing, 14 Crim. L. Rev. 433, (1978). For this reason, the defense attorney must be prepared to present to the sentencing court all factors and circumstances necessary to insure "a reasonably meaningful hearing on sentence." United States v. Pinkney, 551 F.2d 1241, 1251, (D.C.

Cir., 1976). There is at the sentencing stage of the proceeding a duty upon the defense attorney to attempt "to convince the [sentencing] court to be lenient." Wood v. Georgia, supra, 450 U.S. at 272.

Defense counsel in the instant case was unable to present evidence which diminished the culpability of Willie Mooney, Jr., without taking action which would ultimately be adverse to his other clients. The attorney's "struggle to serve two masters...," Glasser v. United States, 315 U.S. 60, 75, 62 S.Ct. 457 (1942) created a conflict of interest which pervaded the entire sentencing hearing and reduced the role of counsel to that of a neutral observer or courtroom spectator.

CONCLUSION

In Wood v. Georgia, supra, this Court alluded to "the risk of conflict," (101 S.Ct. at 1101); the "possibility of conflict of interests," (101 S.Ct. at 1101; and the "potential for injustice," (101 S.Ct. at 1103), in remanding a case wherein defense counsel retained by the employer of co-defendants was possibly influenced by considerations of the employer's interest. The Wood majority remanded the case even though the Sixth Amendment issue had not been presented to either the State Courts or the Supreme Court, suggesting that "....nothing in [Cuyler v. Sullivan, supra] rules out the raising of a conflict of interest problem that is apparent in the record." Wood v. Georgia, supra, 450 U.S. at 272, N. 18. In so finding, the Wood court further provided:

> "It is, however, difficult for this Court to determine whether an actual conflict of interest was present, especially without the benefit of briefing and argument on this issue. Nevertheless, the record does demonstrate that the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." 450 U.S. at 272-273.

There was, under the particular circumstances evidenced by the trial court record, a "...duty [upon] the Court to recognize the possibility of disqualifying conflict of interest." (Id., 450 U.S. at 272), (emphasis added). Ample evidence existed which should have alerted the trial court of the defense attorney's conflict of interest and prompted judicial inquiry ex proprio

mutu.[1] Because both the trial court and the original appellate counsel failed to respond to these circumstances, defendant is entitled to present his claim to this Court and request a remand for the purposes of developing those facts which will ultimately support the constitutional relief requested. It is respectfully submitted that this Honorable Court should be guided by its recent decision in Wood v. Georgia, supra, wherein it found itself

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[1]In addition to escaping the attention of the trial court, the facts and circumstances pointing to an obvious conflict were presented to the original appellate counsel, Mr. James D. Sparks, who failed to note the significance of these facts and assign the glaring constitutional violation as error for the sake of appeal. Defendant therefore contends that Mr. Sparks failed to render effective representation in the preparation of his appeal by failing to preserve this error for appellate review in the manner prescribed by law.

empowered to consider "a possible due process violation ... apparent on the particular facts of a case," (450 U.S. at 265) and remanded the cause to the trial court for "a hearing to determine whether the conflict of interest that this record strongly suggests actually existed," (450 U.S. at 273) at the pre-plea and sentencing stages of the proceeding.

Petitioner Willie Mooney, Jr., has amply shown that the decision of the Supreme Court of the State of Louisiana, affirming his judgment of conviction and sentence, and denying rehearing on the grounds presented, is totally contradictory to the relevant interpretations of federal constitutional law recently set forth by this Court. For this reason, this Honorable Court should grant a writ of certiorari to review the decision of the Supreme Court of the State of Louisiana. In the

alternative, this Court should nonetheless be guided by Wood v. Georgia, supra, and remand the cause to the trial court with instructions to conduct a full hearing as to the conflict of interest suggested by the record.

Respectfully submitted,

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P. O. BOX 3168
MONROE, LOUISIANA 71210
ATTORNEY FOR PETITIONER

CERTIFICATE

I hereby certify that I have furnished an exact copy of the foregoing Petition for Writ of Certiorari to Mr. William R. Coenen, Jr., District Attorney, Richland Parish, Rayville, Louisiana, by placing same in the U.S. Mail, postage prepaid, this _____ day of _____, 1983.

_____
OF COUNSEL

SUPREME COURT OF LOUISIANA

NO. 82-KA-0929

STATE OF LOUISIANA

V.

WILLIE MOONEY, JR.

Appeal from the 5th Judicial District Court,
Parish of Richland,
Honorable Sonny N. Stephens, Judge.

PER CURIAM

36-711

Affirmed

Supreme Court of Louisiana

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE # 17

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 11th day of February, 1983, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS DENIED:

81-C-0544 c/w 81-C-0557	Brownie Reed Hebert v. Gulf States Utilities, et al MARCUS, DENNIS & BLANCHE, J.J., would grant a rehearing.
81-C-1114	Succession of Ronald Bruce Goode CALOGERO, BLANCHE & WATSON, J.J., would grant a rehearing.
81-KA-2050	State of Louisiana v. Burl L. Parker DIXON, C.J., & BLANCHE, J., would grant a rehearing.
82-KA-0045	State v. Ray Charles Johnson
82-C-0125	Succession of Viola Alexander Clivens DIXON, C.J., WATSON & LEMMON, J.J., would grant a rehearing.
82-KA-0423	State v. Romela Grace Trahan and Max Dennis LeLeaux
82-KA-0634	State v. Akie Hall, III
82-K-0747	State v. Alvin Scott Lloyd
82-C-0760	Eddie Harlaux, et al v. Leroy Harlaux DIXON, C.J., & LEMMON, J., would grant a rehearing.
82-KA-0929	State v. Willie Mooney, Jr.
82-C-1243	Colonial Bank v. Marina Seafood Market, Inc., et al DIXON, C.J., DENNIS & LEMMON, J.J., would grant a rehearing.
82-KA-1372	State v. James W. Bunch
82-KA-1417	State v. Jerry Wayne Harrell
82-KA-1451 c/w 82-KA-1453	State v. Leonard Dowell
82-KA-0754	State v. Harold Garner See Per Curiam LEMMON & DENNIS, J.J., concur. CALOGERO, J., dissents from the denial of rehearing.
82-K-1531	Freddie Williams v. Cornelius Bernard, Sr., et al MARCUS & LEMMON, J.J., would grant a rehearing.
82-K-1538	State v. Ernest Robertson DENNIS, J., concurs in the denial.
82-KA-1585	State v. William E. Chatman
82-KA-1641	State v. Robert P. Edwards
82-KA-1648	State v. Thomas L. Coyne
82-KA-1724	State v. Mitchell Antley, Jr.